



The Florida House of Representatives

Office of the General Counsel

Dean Cannon, Speaker
Office of the General Counsel

George T. Levesque
General Counsel

MEMORANDUM

OPINION 11 - 02

To: The Honorable Representative
From: George Levesque, House General Counsel
Date: February 17, 2011
Re: Member Employment Activities

A handwritten signature in black ink, appearing to be "G. Levesque", is written over the "From:" line.

You have posed the following questions:

1. May I continue my employment with _____ and continue to provide services in the form of expert testimony?
2. If question one is answered in the affirmative, what limitations may apply regarding my offering testimony in cases involving state agencies?

Brief Response:

1. You may remain employed by _____ and provide expert testimony in front of judicial tribunals; however, you may not testify on behalf of a client for compensation in administrative proceedings before state agencies.
2. You may testify as an expert witness under contracts entered into by _____ with state agencies, in administrative proceedings and before judicial tribunals, but you may not solicit state agencies for business on behalf of your company, nor may you negotiate contracts for your company with state agencies.

Factual Background

You are the founder and owner of _____ (Company) and also an attorney. Through the Company, you provide expert advice and testimony in insurance regulatory and litigation matters. Prior to your election, you served as a key expert witness for the Department

of Financial Services (DFS) in litigation that is ongoing. DFS has indicated it would like to continue to retain you as its expert. You have inquired as to whether you may continue your employment as an expert for _____ and if so, what limitations would apply to testifying in cases which may involve state agencies.

Analysis

Your situation raises a number of potential conflicts, including conflicts in employment with the Company, conflicts related to the Company's engagement by a state agency, and conflicts related to your personally providing services to a state agency. A review of the applicable ethics opinions, statutes, and case law has not produced any cases with facts that are directly on point; however, there are situations which may be reasonably analogized to your particular circumstances. I will address each potential conflict in turn in my opinion below.

As a prefatory matter, it is my opinion that there is nothing that would prohibit your employment with the Company. Section 112.313(7), Florida Statutes, provides:

(a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

...

2. When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

(b) This subsection shall not prohibit a public officer or employee from practicing in a particular profession or occupation when such practice by persons holding such public office or employment is required or permitted by law or ordinance.

Under the first prong of § 112.313(7)(a), Fla. Stat., it is my opinion that there is no prohibited conflict related to your employment as an expert witness for the Company. Section 112.313(7)(a), Fla. Stat., prohibits a member from having a contractual relationship with any business entity doing business with or regulated by their agency – in this case, the Legislature. *See* CEO 87-2. Nothing in your request suggests that you or the Company through which you provide expert testimony will be doing business with the Legislature. Furthermore, to the extent that the Company is regulated by the Legislature through the enactment of laws, the exemption provided in § 112.313(7)(a)2, Fla. Stat., would make the prohibition inapplicable.

Under the second prong of § 112.313(7)(a), Fla. Stat., it is my opinion that there is also no prohibited conflict that would impact your employment with the Company. A conflict of interest has been statutorily defined as “a situation in which regard for a private interest tends to lead to disregard of a public duty or interest.” *See* § 112.312(22), Fla. Stat. This second clause of § 112.313(7)(a) prohibits a public officer from having any contractual relationship which would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties, or which would impede the full and faithful discharge of his public duties. In *Zerweck v. State Commission on Ethics*, 409 So. 2d 57 (Fla. 4th DCA 1982), the District Court of Appeal said that this provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private interests to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which “tempts dishonor.” I am not aware of anything in the facts above or inherent in your employment as an expert witness with the Company that creates a conflict that would “tempt dishonor.”

While I see no conflict with your employment by the Company, it is my opinion that you may not represent the Company before state agencies. Section 8(e) of Article II of the Florida Constitution, § 112.313(9)(a)3, Fla. Stat., and House Rule 15.7 prohibit you, as a current member of the Legislature, from *personally representing* another person or entity for compensation before any state agency other than a judicial tribunal during your term of office. This prohibition is personal to you and does not apply to the Company or its employees. *See e.g.*, CEO 08-20; and CEO 83-13. “Represent,” as defined in Section 112.312(22), Fla. Stat., means actual physical attendance in an agency proceeding, writing letters and filing documents, or personal communications with the officers and employees of the agency on behalf of a client. *See also* CEO 93-24. Because your business is run through the Company, the law prohibits you from personally representing the Company before any state agency other than judicial tribunals. *See* CEO Final Order 90-86. Employees or agents of the Company would not be prohibited from soliciting business from state agencies as the prohibition is personal to you, and not employees or agents of the Company. *See* CEO 03-03. To the extent that the Company does business with a state agency, you would be prohibited from soliciting or participating in bid proposals to the agency or communicating with the agency related to such proposals on behalf of the Company. *See e.g.*, CEO 82-33, CEO 83-13, and CEO 84-9.

Additionally, it is my opinion that you would be permitted to perform work under a contract between the Company and a state agency. In CEO 82-33, the Commission advised a state representative that he could assist an employee of a mortgage insurance company in the performance of a contract between the company who employed the representative and a state agency. *See also* CEO 89-6 (concluding the law did not prohibit a state representative from participating on behalf of the law firm in the development of a response to a request for proposals issued by a state agency).

Having said that, I would caution you to be scrupulous in abstaining from any solicitation, negotiations or discussion related to business between the Company and a state agency. In analyzing these conflicts, I observe that the circumstance in which the greatest temptation for the

misuse or abuse of office pertains to the contracting for services between the Company and a state agency. The language of the prohibition deals with the representation of clients for compensation before state agencies and appears intended to protect against a state officer obtaining favorable treatment for a client. *See* CEO 91-54 (recognizing the position of a legislator to potentially influence agency decisions in settlement negotiations). In your situation, some of your work as an expert witness is derived from a contract between the Company and a state agency and is performed on behalf of the state agency. To the extent that the Company's contractual relationship with the agency for your services predates your election, there certainly would be no appearance of impropriety; however, you should not personally be involved in soliciting or negotiating a renewal of the existing contract or new contracts for your services through the Company. Where your testimony is submitted in proceedings where state agencies have contracted with the Company, the factors that would "tempt dishonor" or cause you to disregard your public duty would most likely present themselves in the initial contracting for expert testimony, not in the consultation and testifying that would be performed under the contract with the state agency.¹ I emphasize this point so that you will be exceptionally careful in your personal dealings in relation to the Company's solicitation of business from state agencies and in your communications that are made between you and a state agency related to your performance before and after a contract has been awarded.

It is my opinion that testifying as an expert witness, even where you are compensated by a party for your testimony, does not constitute "representation" within the meaning of the prohibition on representing persons or entities for compensation before state agencies. As alluded to previously, "represent" has been statutorily defined as "actual physical attendance on behalf of a client in an agency proceeding, the writing of letters or filing of documents on behalf of a client, and personal communications made with the officers or employees of any agency on behalf of a client." *See* § 112.312(22), Fla. Stat. These activities are all done on behalf of a client, and generally connote advocacy for a client or the client's interests. In contrast, a witness is not an advocate, but a person with knowledge relevant to the matters that are subject to dispute. *See* § 90.604, Fla. Stat. The Law Revision Council Note comments that "a witness who has actually perceived and observed the fact is the most reliable source of information." In fact, a witness is bound by affirmation or oath to submit testimony that is "the truth, the whole truth, and nothing but the truth." An expert witness is still bound by facts but does have greater flexibility in providing opinion testimony as a result of their knowledge, skill, experience, training, or education but only where it would aid the trier of fact in understanding the evidence. *See* § 90.702, Fla. Stat.

For attorneys, the distinction between an advocate and witness is further enforced by rule. The Rules Regulating the Florida Bar prohibit in most instances an attorney from testifying as a witness and representing a client as an advocate in the same proceedings. *See* R. Regulating Fla. Bar 4-3.7(a). The comment to the rule recognizes the conflicts that may arise in such situations where an advocate for a party must also serve as a witness. "Combining the roles of advocate and

¹ This is not to say that there are no conflicts that could arise under your performance of the contract, but such conflicts do not appear obvious or probable from the facts as stated. Once a contract is secured, your interests and the agency's interest would appear to be aligned.

witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.” Whereas a lawyer is obligated to zealously assert his clients position, *see* R. Regulating Fla. Bar Preamble, a witness, even a paid expert witness, is constrained to tell the truth, regardless of whether the testimony or opinion may be adverse to a particular party.

Because testifying as an expert witness is different than representation, it is my opinion that you would be permitted to testify as an expert witness before state agencies, including administrative proceedings. In reaching this conclusion, I do not ignore that at first blush, your testimony proffered in an administrative proceeding by a person or entity which has paid you for your testimony raises the specter of representing a person or entity for compensation before a state agency, even if it is the state agency that has paid for your services. But as I observed previously, the nature of a witness offering fact and opinion testimony in a proceeding is fundamentally different than an attorney or lobbyist advocating for a client. Moreover, the safeguards in the evidence code and the Rules Regulating the Florida Bar provide protections against a witness crossing the line into advocacy. *See also* CEO 84-6 (recognizing state legislator representing a client against a state agency has the appearance of influence over the agency in settlement negotiations, but recognizing other restrictions that safeguard against improper conduct such as the Code of Professional Responsibility).

I would be remiss if I did not provide some additional cautionary advice. The Code of Ethics further provides that no member “shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others.” *See* §112.313(6), Fla. Stat. Moreover, no member “shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity.” *See* § 112.313(8), Fla. Stat. While I am not aware of any facts which would indicate that these provisions are applicable, the fact that a company with which you are affiliated is contracting with a state agency may present opportunities that would tempt dishonor. You will want to be scrupulous in observing the prohibition on soliciting agencies on behalf of the Company. I recognize that the selection of experts as witnesses can be subjective, but to the extent such selections by an agency can be based on objective criteria, such processes would facilitate the appearance of fair and honest dealing when the Company is retained. The law grants latitude to members based upon the recognition that they are citizen- legislators that require outside employment and have lives outside their public office. That concept sometimes may get lost in public discourse, and what may be a legally tolerated conflict of interest may be viewed as inappropriate or corrupt in the court of public opinion.

Concerning voting conflicts, it is impossible to assess whether conflicts exist at this time. That analysis requires an examination of the matter pending and the facts potentially giving rise to the conflict. House Rule 3.2 requires you to abstain from voting on any to when you know or believe the measure would inure to your special private gain or loss. House Rule 3.2 and Section 112.3143, Fla. Stat., requires disclosure on measures which you know would inure to the special

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private gain or loss of any principal by whom you are retained. In the present case, the principal would be the Company. As you begin to consider and cast your vote on legislation that comes before you, please keep these obligations in mind.

The above opinion is based on facts that you have provided and as stated. If your situation is materially different than the facts stated or if there are additional relevant facts that have been omitted, I would need to review the new information, and my opinion may change accordingly.

I would also note that there is no provision in § 112.313, Fla. Stat., that would provide a safe harbor in the event a complaint is filed with the Commission on Ethics. As such, I cannot say what effect this would have on the Commission's deliberations should a complaint be filed that raises these issues. However, I would expect this opinion to mitigate any complaint that the Commission may refer or which may be filed with the House of Representatives. Given the unique nature of your employment and that this would appear to be a matter of first impression, you may wish to consider the merits of seeking an advisory opinion directly from the Commission. I make myself available to discuss this opinion and any questions you may have at our mutual convenience.